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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: JUN 11 2015

PETITION RECEIPT #: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]


PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a “multi-specialty, Medicare licensed home healthcare agency.” On January 21, 2014 it filed a Form I-140, Immigrant Petition for Alien Worker, seeking to permanently employ the beneficiary in the United States as a nurse pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). Under this statutory provision immigrant classification may be granted to members of the professions holding advanced degrees or aliens of exceptional ability in the sciences, arts, or business. The petitioner specifically requested this classification for the beneficiary in Part 2 of the Form I-140 – “Petition Type” – by checking the box at 1.d stating that the petition was being filed for “[a] member of the professions holding an advanced degree or an alien of exceptional ability.”

The petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the Department of Labor (DOL) prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15. In accord with these provisions the instant petition was filed with a completed but uncertified ETA Form 9089.

If the Schedule A occupation is a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); or a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).¹

The Director denied the petition on October 23, 2014, finding that the minimum requirements for the proffered position as stated on the ETA Form 9089 – a bachelor’s degree and no experience – do not qualify the job for classification as an advanced degree professional. The regulation at 8 C.F.R. § 204.5(k)(2) defines “advanced degree,” in pertinent part, as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate

¹ The record shows that the petitioner has the requisite certificate from CGFNS and was licensed by the State of Illinois as a registered professional nurse at the time the petition was filed.

degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

Since the nurse position at issue in this petition does not require either a master's degree or a bachelor's degree and five years of progressive experience in the specialty, the Director concluded that it is not eligible for advanced degree professional classification as sought by the petitioner.

The petitioner filed a timely appeal, along with a brief from counsel, on November 14, 2014. We conduct appellate review on a de novo basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

Counsel points out that the Director mistakenly referred to the minimum job requirements in the ETA Form 9089 as a bachelor's degree in physical therapy, rather than in nursing, plus a license from the State of Illinois in physical therapy, rather than in nursing. These mistakes, however, were not key to the decision. The Director's key finding was that the minimum educational and experience requirements for the job offered – namely, a bachelor's degree and no experience – were less than required to meet the definition of an “advanced degree” under 8 C.F.R. § 204.5(k)(2). Since the ETA Form 9089 does not require either a master's degree or a bachelor's degree plus five years of qualifying experience, the proffered position is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act. In the appeal brief counsel acknowledges that the minimum educational requirement for the job is a bachelor's degree in nursing,² and that no experience is required. Therefore, the petition cannot be approved for an advanced degree professional.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.

² Thus, the proper classification for the petition would be as a professional under section 203(b)(3)(A)(ii) of the Act, for which the minimum requirement is a U.S. bachelor's degree or a foreign equivalent degree.